RAZAK ABU

v.

PP

HIGH COURT MALAYA, SHAH ALAM
NALLINI PATHMANATHAN JC
[CRIMINAL APPEAL NO: 42-73-2004]
26 MARCH 2008

CRIMINAL LAW: *Penal Code - Section 467 - Forgery - Forging documents comprising valuable security - Allegation of - Whether ingredients in respect of offence under s. 467 of the Penal Code made out*

EVIDENCE: *Weight - Testimony of expert - Handwriting expert - Factors considered - Whether expert unable to give opinion as to whether appellant forged signatures on fifteen cheques - Whether there was direct evidence to prove appellant had signed the cheques*

EVIDENCE: *Direct evidence- Absence of - Whether circumstantial evidence relied upon - Whether chain of events showed appellant played key role from inception of banking facility until utilization of funds procured by use of the cheques - Whether circumstances led to certain inference that appellant had forged the signatures on the cheques - Circumstantial evidence, expert evidence and documentary evidence considered in totality - Whether established trial judge did not err in arriving at conclusion of appellant's guilt - Whether ingredients required to prove offence under s. 467 Penal Code made out*

EVIDENCE: *Weight - Testimonies - Minor discrepancies found in evidences of two major witnesses - Whether warrants a rejection*

CRIMINAL PROCEDURE: *Sentence - Fine of RM40,000 - Imposition of - Whether there was tenable basis for such imposition - Whether court constrained to set aside that portion of sentence*

The appellant was convicted on a charge of forging documents which purported to comprise valuable security, namely fifteen cheques belonging to one Afizah Ibrahim ('SP1'), totaling RM37,745.39 which sum of money he employed for his own use, in contravention of s. 467 of the Penal Code. He was sentenced to two weeks imprisonment and a fine of RM40,000 in default of which a term of five years' imprisonment was imposed. He appealed against both conviction and sentence. Briefly, the facts

were that the appellant, one Hamzah Ibrahim ('SP2') who was SP1's brother and one Yuaz Kassim had incorporated a company, Hazeltron Sdn Bhd. The appellant and SP2 had sought the assistance of SP2's father, one Ibrahim Markaya, and SP1 for funding to enable the said company to operate. SP2's father had agreed to allow his house to be charged to a financial institution to enable the procurement of a loan. As neither the appellant nor SP2 were in active employment, SP1, who was employed, agreed to apply for the loan. The appellant arranged for the procurement of a loan in the form of an overdraft facility from EON Bank ('the overdraft facility') against the collateral of the house belonging to SP1's father. According to SP1, soon after the account became operational, the appellant had showed up at SP1's office with two blank cheques and had asked her to sign them, stating that they were required for payment of insurance of the charged property as well as legal fees. SP1 maintained that she had not utilized the facility directly, did not receive any correspondence from the Bank and did not have any further dealings with the account until sometime in May 1997, where SP1 heard directly from the manager of the Bank, one Low Leh Kiong ('SP5') that the overdraft facility in the sum of RM76,000 had been fully drawn down and interest payments were overdue. SP1 was astounded as she had not withdrawn a cent nor received any monies from the facility, save for the two cheques she had signed. She was told that a series of cheques had been made out and the overdraft facility completely utilised. SP1 maintained that she had at no time been in possession of the cheque books to enable such utilization of the facility. Upon SP1's request, she was furnished with all the relevant correspondence and documents relating to the utilization of her account and found that the appellant had been collecting cheque books that were issued in SP1's favour. SP1 testified that she had no knowledge of making any other cheques apart from the two blank cheques the appellant had earlier asked her to sign. According to SP1 and SP2, the appellant, when confronted, had admitted that he had forged SP1's signature on the subject cheques. SP1 thus lodged a police report and the aforesaid charge was preferred against the appellant.

In this appeal, the appellant contended that the essential ingredients in respect of an offence under s. 467 of the Penal Code had not been made out as the prosecution had not proven that the appellant was the one who had signed the cheques

comprising the subject matter of the charge. The appellant maintained that the trial judge had failed to adequately consider the evidence of the handwriting expert, SP8, who was unable to express an opinion as to whether the signatures on the subject cheques were likely to have been made out by the appellant, hence the prosecution had not proved 'forgery.' The appellant further submitted that there had been a failure to undertake a maximum evaluation of the evidence as a consequence of which major contradictions in the testimonies of SP1 and SP2 had been overlooked. The issues that arose were (i) whether the appellant had in fact forged the subject cheques by placing a signature purporting to be that of SP1 on those fifteen cheques; (ii) whether court could ascertain proof of 'forgery' in the absence of a definitive opinion from the handwriting expert and direct evidence.

Held (allowing appeal in part in relation to sentence only):

(1) There were no eye witnesses who could testify as to the signatory of the cheques. While SP1 and SP2 claimed that the appellant had admitted to them that he had signed the subject cheques, there was no such admission from the appellant either in his cautioned statement to the police or court. The handwriting expert, SP8, was unable to give the opinion as to whether the appellant had signed the fifteen cheques so as to match SP1's signature. The net result of SP8's evidence was to exclude SP1 as a signatory of the cheques. The trial judge accepted the expert's opinion in this matter and having reviewed his evidence, there appeared to be no reason why his opinion should not be accepted. Indeed, it was telling that the appellant's defence too was aligned along the same lines outlined by the expert, in that he admitted that the handwriting of the particulars on the subject cheques was his handwriting. From the foregoing, there was no direct evidence to prove that it was the appellant who had placed the signature purporting to be that of SP1 on those fifteen cheques. (paras 31, 32, 33 & 34)

(2) In the absence of direct evidence, circumstantial evidence is to be relied upon. From the foregoing 'chain' of events, it was notable that the appellant had played a key role from the inception of the banking facility until the utilization of the funds procured by the use of the fifteen subject cheques. The

circumstances led to the undubitable/certain inference that it was the appellant who had forged the signatures on the fifteen subject cheques. Therefore, the circumstantial evidence, expert evidence and documentary evidence considered in totality established that the learned trial judge did not err in arriving at her conclusion of guilt *vis a vis* the appellant in relation to the charge against him under s. 467 of the Penal Code. Further, the fifteen cheques fell within the purview of s. 467 of the Penal Code. The ingredients required to prove the offence under s. 467 Penal Code therefore appeared to be made out. (paras 35, 41, 42, 47, 48 & 49)

(3) The trial judge in her consideration of the testimonies of SP1 and SP2 concluded that in spite of some minor discrepancies in their evidences, their testimonies remained intact. The differences were not so material as to warrant a rejection of their evidence as a whole. Moreover, no two witnesses could give identical evidence. If SP1 and SP2's evidence had matched identically in all aspects, this in itself would have given rise to suspicion that the witnesses had concocted their evidence. As such, this ground bore no merit and failed. (paras 51, 52 & 55)

(4) The grave financial loss suffered by SP1 would not be compensated by the imposition of a fine for forty thousand ringgit, as SP1 was not the beneficiary of the fine. In order for her to recover her loss, a civil suit would have to be instituted to recover the monies she had lost. In this instance, there appeared to be no tenable basis for the imposition of the part of the sentence relating to the forty thousand ringgit fine and the term of imprisonment in default of the payment of such fine. This court was constrained to set aside that portion of the sentence and substitute instead, a fine of five thousand ringgit and in default of payment of such a fine, a term of imprisonment of three months. The rest of the sentence remained intact, namely, the imprisonment of two weeks. (paras 59 & 61)

Case(s) referred to:

AEG Carapeit v. AY Derderaian [1961] AIR Cal 359 ***(refd)***

Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***

Bank of India v. Yeturi Maredi Shanker Rao [1987] Cri LJ 722 ***(refd)***

Chandrasekaran & Ors v. PP [1970] 1 LNS 11 HC ***(refd)***

Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***

Pie Bin Chin v. PP [1983] 1 LNS 70 HC ***(refd)***
PP v. Datuk Hj Harun Hj Idris (No 2) [1976] 1 LNS 97 HC ***(refd)***
State (Delhi Administration) v. Pali Ram AIR [1979] Supreme Court 14 ***(refd)***
Tan Chow Soo v. Ratna Ammal [1967] 1 LNS 178 PC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 45, 47, 73
Penal Code, ss. 463, 464, 467

Evidence Act [India], s. 73
Penal Code [India], s. 467

Other source(s) referred to:
Teo Say Eng, *A Practical Handbook on Criminal Prosecution in the Subordinate Courts,* 2000, p 336
Ratanlal & Dhirajlal, *Law of Crimes,* 3rd edn, 2346

For the appellant - Ramesh K Supramaniam; M/s George Varughese & Co
For the prosecution - Azar Irwan Moh Ariffin; DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Nallini Pathmanathan JC:

[1] Razak bin Abu, the appellant in this appeal, was convicted on a charge of forging documents which purported to comprise valuable security, namely fifteen cheques belonging to one Afizah bte Ibrahim ('SP1') totaling RM37,745.39 (Ringgit Malaysia Thirty Seven Thousand, Seven Hundred and Forty Five and Thirty Nine Sen) which sum of money he employed for his own use, in contravention of s. 467 of the Penal Code. He was sentenced to two weeks imprisonment and a fine of RM40,000 (Ringgit Malaysia Forty Thousand) in default of which a term of five years' imprisonment was imposed. He appeals against both his conviction and sentence. The sentence has been stayed pending this appeal.

[2] The primary issue that arises for consideration in this appeal is whether the appellant had in fact, forged the subject cheques by placing a signature purporting to be that of SP1 on those fifteen cheques.

A **Material Facts**

[3] In September 1995, the appellant, one Hamzah bin Ibrahim ('SP2') who is SP1's brother, and one Yuaz bin Kassim incorporated a company known as Hazeltron Sdn. Bhd. to carry
B out general trading and to make tools. No business was conducted despite it having been incorporated, because there was no capital or funding to enable it to operate a business. The appellant and SP2 therefore sought the assistance of SP2's father, one Ibrahim Markaya (who is also SP1's father) and SP1, his
C sister. SP2's father, while having no monies to loan to Hazeltron Sdn. Bhd., agreed to allow his house to be charged to a financial institution to enable the procurement of a loan. The appellant intimated that he could arrange for the procurement of a loan on the basis of such collateral. However, as neither he nor SP2 were
D in active employment they needed to find someone with a fixed income to apply for the loan. For this they turned to the appellant's sister, SP1 who was employed. The appellant arranged for the procurement of a loan in the form of an overdraft facility from EON Bank ('the overdraft facility') against the collateral of
E the house belonging to SP1's father.

The Complainant, SP1's Evidence

[4] SP1 testified that she agreed to apply for an overdraft facility to assist the appellant and SP2 to facilitate their company,
F Hazeltron to commence business. SP1 consented to assist in their venture as SP2 is her brother and the appellant is related and was known to her for some time. She was clear in her testimony, however, that the overdraft facility once granted, would not actually be be utilized or drawn-down. The existence of the
G overdraft facility was to give assurance to potential clients that Hazeltron had sufficient funding for its business. SP2's evidence while largely consistent with that of SP1, differed in one aspect. He maintained that the overdraft facility was procured to facilitate Hazeltron in its business, and that monies could, with the
H authorization of SP1, be utilized for that purpose. However Hazeltron did not have any business or any projects whatsoever between the years 1995 and 1997. The cheques comprising the subject matter of the charge were issued and the proceeds collected or utilized between the months of May and August
I 1996. Accordingly there was no reason for the utilization of the overdraft facility for the purposes of Hazeltron's business in 1996 when the subject cheques were issued and encashed.

[5] SP1 applied for the overdraft facility in early 1996 from EON Bank ('the bank'). It is not in dispute that the appellant was the one who procured the application form and took the various particulars from SP1, the applicant and her husband, Ahmad Razlan Akmat who was the guarantor for the facility, filling in the application form for them. The appellant submitted the application on behalf of SP1. There were two addresses stipulated in the application, namely SP1's home address and the office address of the appellant. In or around 1 March 1996 the bank advised SP1 that it had approved her application for the facility. SP1, SP2 and the appellant went to the bank soon after receipt of the letter of offer and SP1 executed the relevant documentation consenting to the terms and conditions for the grant of the facility. Again it was the appellant who filled in the account application form and applied for a current account on behalf of SP1. Such an account was necessary to operate and utilize the overdraft facility. There were two addresses provided in the application form, a mailing address and a permanent home address. The former was filled in with the appellant's office address while the latter reflected SP1's home address. Accordingly all correspondence relating to the account was sent to the appellant's office address. The security for the facility was SP1's home in Cheras Indah which by then, had already been transferred by her father to SP1. SP1 duly executed the relevant documentation to charge the house to the bank as required under the terms and conditions for the grant of the facility. SP1 also signed a specimen signature card for the bank.

[6] The overdraft facility became operational after this. However SP1 neither utilized the facility directly nor received any correspondence from the bank until about a year later, in May 1997. Soon after the account became operational, however, the appellant showed up at SP1's then office in Petaling Jaya with two blank cheques. He asked her to sign the blank cheques, stating that they were required for payment of insurance for the charged property as well as legal fees. When SP1 queried him as to why no amounts were filled in on the two cheques and asked what the total amount due was, he explained that he did not know the amount yet. As both the payments appeared to be necessary for the purposes of the overdraft facility, and as SP1 trusted the appellant she signed both cheques. These two cheques do not

comprise the subject-matter of the charge against the appellant. It is pertinent that according to SP1, the appellant did not come to see her with a cheque book, but instead merely produced two blank cheques. SP1 maintained that she never received any cheque books from the bank. After this SP1 did not have any further dealings with the account.

[7] In May 1997 SP1 heard directly from the manager of the bank, one Low Leh Kiong ('SP5') that the overdraft facility in the sum of RM76,000 had been fully drawn down and interest payments were overdue. SP1 was astounded as she had not withdrawn a cent nor received any monies from the facility, save for the two cheques she had signed. She was told that a series of cheques had been made out and the overdraft facility completely utilized. SP1 however maintained that she had at no time been in possession of cheque books to enable such utilization of the facility.

[8] SP1 then asked to be furnished with all the relevant correspondence and documents relating to the utilization of her account. She found that upon approval of the overdraft facility having been granted, the appellant who had filled in the loan application form for SP1 had applied for a current account. Cheque books had been issued in SP1's favour and the appellant had collected those cheque books. The mailing address on the application was the appellant's office address, and accordingly all correspondence had been sent there. SP1 testified that apart from the two cheques which the appellant had brought along for her to sign, she had no knowledge of the making of any other cheques. Neither had she signed any further blank cheques. She explained that she had consented to signing the first two cheques because they related to legal fees incurred in order to affect a charge of the house and for insurance for the property.

[9] Once SP1 had garnered the relevant facts, SP1 together with SP2, confronted the appellant. According to SP1 and SP2, the appellant admitted that he had forged SP1's signature on the subject cheques. He stated that he had been forced to do so because it was difficult to meet up with SP1. He promised to make good the sum including the amounts in the first two cheques that she had signed herself. However this was not to be. SP1 and SP2 heard nothing more from the appellant. Finally SP1 lodged a police report. Hence the aforesaid charge was preferred against the appellant. Authorization.

The Handwriting Expert

[10] SP1's evidence was corroborated in one crucial particular by a handwriting expert, Wong Kong Yong ('SP8'). He concluded after examining thirty-six pages of specimen handwriting from SP1 as well as her original signature on the first two cheques she admitted signing, and eighty-one pages of the appellant's specimen handwriting procured over a similar period of time that:

(i) The signatures on the fifteen cheques comprising the subject matter of the case did not belong to SP1;

(ii) SP8 could not give an opinion as to whether the signatures on the forged cheques and one receipt from EON Bank originated from or matched the appellant's handwriting, when he compared the eighty one pages of script from the appellant against the said cheques;

(iii) The handwriting of the particulars on the forged cheques matched the handwriting of the appellant.

[11] The expert therefore concluded that SP1 had not signed the fifteen cheques comprising the subject matter of the charge.

Bank Witnesses

[12] Several witnesses were called from the bank to testify as to the opening of the account and its conduct. It was evident that while Afizah had authorized the opening of the account and signed the application for the opening of an account and the requisite specimen signature card there had been no direct contact between the bank's officers and SP1 after that date until SP5's conversation with SP1 in May 1997.

[13] They confirmed that the overdraft facility was operated through the opening of a current account and that all correspondence had been sent to the mailing address on the application form namely the appellant's office address.

The Appellant's Evidence

[14] After hearing the prosecution's case, the learned trial judge who took over the conduct of this trial after four witnesses had given evidence before another trial judge, concluded that a *prima facie* case had been made out and called for the accused to enter defence.

[15] In his evidence the appellant did not dispute the following facts, namely that:

(a) He had filled in the particulars on the fifteen cheques comprising the subject matter of the charge;

(b) He had made out four of the fifteen cheques in favour of his wife's trading company, one Perniagaan Anggi, encashed seven of the fifteen cheques and made out the remaining four cheques in favour of third parties who had no connection whatsoever with Hazeltron Sdn. Bhd.;

(c) He had collected the cheque books from the bank.

[16] However the appellant went on to testify that each and every one of the subject cheques had been authorized by SP1 who had signed those cheques. He maintained that he had at all times given the cheques to SP2 who procured SP1's signature on the subject cheques. It should be noted that the defendant's contentions were not put to SP2 in the course of his cross-examination. It was put to SP1 that she had authorized and signed the subject cheques.

[17] In the further course of his evidence the appellant also admitted that it was not true that Hazeltron had been operated as a business on the basis of the overdraft facility afforded by SP1. He also conceded as stated by SP2 that Hazeltron had never been in operation. He however maintained that SP1 had authorized the utilization of the entire facility to help him and SP2 in other construction ventures they had, which did not include the business of Hazeltron.

The Trial Judge's Decision

[18] In her judgment the trial judge accepted SP1 and SP2's evidence while rejecting that of the appellant. She found SP1 to be a forthright witness whose credibility was not damaged during the course of cross-examination. With respect to SP2 she concluded that despite minor discrepancies his evidence essentially verified that of SP1. She utilized that part of the handwriting expert's evidence that concluded that the signatures on the subject cheques were not that of SP1. As for the appellant, the learned trial judge found that the subject cheques were utilized for the appellant's personal upkeep and not for the purposes of

Hazeltron, particularly as Hazeltron was not functional during the relevant period. The appellant had also admitted that some of the cheques were deposited into his wife's business account but failed to account for the same. Similarly there was a failure to account for the cheques that he had encashed. Accordingly, the learned trial judge concluded that the appellant's testimony amounted to a mere denial that he had forged SP1's signature. The trial judge made the following salient finding of fact:

> ... In addition the Court was unable to accept the Appellant as a witness of truth. At one point he said he was doing administrative work only for Hazeltron in spite of having told the court that he and Hamzah Ibrahim were partners and running the business. His attempts to explain his version had instead manifested how he deliberately used the OD facility for his own interest. The money was actually used to finance his personal upkeep and his own business ventures.
>
> The Court noted his demeanour in the witness box and had seen how he faltered not only under cross-examination. Even his testimony in examination in chief was not consistent. His attempt to avoid answering questions from the prosecution led the Court having to ask him the questions. This had compelled him to give an answer, which in essence admitting using the OD facility for himself not for Hazeltron.

The Grounds Of Appeal

[19] Although several grounds of appeal were raised in the petition of appeal, learned counsel for the appellant, Mr. Ramesh condensed these grounds as follows:

(i) He contended that the essential ingredients in respect of an offence under s. 467 of the Penal Code had not been made out as the prosecution had not proven that the appellant was the one who had signed the cheques comprising the subject matter of the charge. In this context he maintained that the trial judge had failed to adequately consider the evidence of the handwriting expert, SP8 who was unable to express an opinion as to whether the signatures on the subject cheques were likely to have been made out by the appellant. In short he maintained that the prosecution had not proved 'forgery';

(ii) Learned counsel further submitted that there had been a failure to undertake a maximum evaluation of the evidence as a consequence of which major contradictions in the testimonies of SP1 and SP2 had been overlooked.

A **Issues In This Appeal**

[20] As stated at the outset the primary issue for consideration in this appeal is whether the appellant had in fact, forged the subject cheques by placing a signature purporting to be that of
B SP1 on those fifteen cheques. This in turn invites a consideration of the manner of proof of a charge of forgery.

[21] The further issue that falls for consideration as set out in the grounds of appeal is whether indeed, there were such
C contradictions in the evidence of some of the key witnesses, SP1 and SP2, as warranted a rejection of their testimony as a whole. Prior to a consideration of these issues however, the ingredients required to satisfy a charge under s. 467 of the Penal Code are considered.

D **Ingredients Of An Offence Under s. 467 Of The Penal Code**

[22] Section 467 of the Penal Code provides as follows:

> **... Whoever forges a document which purports to be a valuable security** or a will, or an authority to adopt a son, **or**
E **which purports to give authority to any person** to make or transfer any valuable security, or to receive the principal, interest, or dividends thereon, or **to receive or deliver any money,** movable property, or valuable security, or any document purporting to be an acquittance or receipt, acknowledging the
F payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, **shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.**

[23] The essential ingredients of the offence which need to be
G established by the prosecution are that:

(i) The appellant must have forged a document; and

(ii) The document must be one of the classes specified in the section. (see *Law of Crimes* by Ratanlal & Dhirajlal 3rd edn @
H 2346; *A Practical Handbook on Criminal Prosecution in the Subordinate Courts'* Teo Say Eng 2000 @ 336)

[24] 'Forgery' in turn is defined in s. 463 of the Penal Code as follows:

I

> Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person or to support any claim or title or to cause any person to party with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed commits forgery.

[25] The definition of 'making a false document' is set out in s. 464 of the Code. The relevant part of the said section reads as follows:

> A person is said to make a false document:
>
> First – **Who dishonestly or fraudulently makes, signs,** seals, or executes **a document or part of a document,** or makes any mark denoting the execution of a document, **with the intention of causing it to be believed that such document was made, signed,** sealed or executed **by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed,** or executed, or at a time at which he knows that it was not made, signed, sealed, or executed; …

Issue 1: Did The Appellant Forge The Fifteen Cheques Comprising The Subject Matter Of This Charge?

[26] From the foregoing definitions in the Penal Code, it is evident that the issue of the forgery of the fifteen cheques may be ascertained by considering whether the appellant did 'dishonestly or fraudulently' make or sign the subject cheques, or even a part of those cheques with the intention of causing it to be believed that such cheques were made by SP1, when he knew that she did not at any time sign or make out those cheques. Neither had she at any time authorized the issuance or utilization of those cheques.

[27] This in turn begs the question of how forgery 'or the dishonest or fraudulent making out or signing of the subject cheques may be proven. Under s. 45 of the Evidence Act 1950 the opinion of a handwriting expert as to the genuineness of handwriting or signatures are expressly admissible on the grounds that this is a relevant fact. The evidence of SP8, the handwriting expert is therefore both admissible and relevant. Section 47 of the Evidence Act 1950 provides for the admissibility of the evidence of a witness on the genuineness of handwriting where that witness can be said to be acquainted with the person stated to have

written the disputed handwriting or signature. And s. 73 of the Evidence Act 1950 allows the court or a witness to compare a disputed signature or handwriting with the genuine writing of the alleged writer. However all three sections prescribe great caution in undertaking such an exercise.

[28] In *State (Delhi Administration) v. Pali Ram* AIR [1979] Supreme Court 14 Sarkaria J considered the various sections of the Indian Evidence Act which containes provisions similar to that of Malaysia. He held as follows in relation to the proof of the handwriting of a person:

> ... Just as in English Law, the Indian Evidence Act recognizes two direct methods of proving the handwriting of a person:
>
> (1) By an admission of the person who wrote it
>
> (2) By the evidence of some witness who saw it written.
>
> These are the best methods of proof. These apart there are three other modes of proof by opinion. They are:
>
> (i) By the evidence of a handwriting expert (Section 45)
>
> (ii) By the evidence of a witness acquainted with the handwriting of the person who is said to have written the writing in question. (Section 47)
>
> (iii) Opinion formed by the Court on comparison made by itself. (Section 73)
>
> All these three cognate modes of proof involve a process of comparison. In mode (i) the comparison is made by the expert of the disputed writing with the admitted writing of the person who is said to have written the questioned document. In (ii) the comparison takes the form of a belief which the witness entertains upon comparing the writing in question with an exemplar formed in his mind from some previous knowledge or repetitive observance of the handwriting of the person concerned. In the case of (iii), the comparison is made by the Court with the sample writing or exemplar obtained by it from the person concerned.

[29] It is notable however that the Indian Court went on to caution the utilization of s. 73 of the Indian Evidence Act which is similar to the Malaysian s. 73 in the following terms:

> ... Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identity of a handwriting which forms the sheet-anchor of the prosecution case against a person accused of an offence, solely on comparison made by himself. It is therefore, not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert …

[30] And as for the role of a handwriting expert, that too was carefully circumscribed by the Indian Court as follows:

> ... It is not the province of the expert to act as Judge or Jury. As rightly pointed out in *Titli v. Jones* ILR 56 All 428: AIR [1934] All 273 the real function of the expert is to put before the Court all the materials, together with reasons which induce him to come to the conclusion, so that the Court, although not an expert, may form its own Judgment by its own observation of those materials. Ordinarily , it is not proper for the Court to ask the expert to give his finding upon any of the issues, whether of law or fact, because, strictly speaking such issues are for the Court or jury to determine. The handwriting expert's function is to opine after a scientific comparison of the disputed writing with the proved or admitted writing with regard to the points of similarity and dissimilarity in the two sets of writings. The Court should then compare the handwritings with its own eyes for a proper assessment of the value of the total evidence …

[31] What was the evidence in this case in relation to the handwriting and signatures on the fifteen disputed cheques? The 'best evidence' as outlined in the case above was not available. There were no eye witnesses who could testify as to the signatory of the cheques. And while SP1 and SP2 claimed that the appellant had admitted to them that he had signed the subject cheques, there was no such admission from the appellant either in his cautioned statement to the police or in court.

[32] The prosecution, and subsequently the trial judge, did however rely on the evidence of the handwriting expert, SP8 whose opinion was that:

(a) SP1's original signature as evidenced by the two original cheques which SP1 – admitted signing on the request of the appellant, did not match the signatures found on the fifteen cheques comprising the subject matter of the charge; in short, SP1 was not the signatory to those cheques. SP8 found that the elements of writing in the two sets of documents were different;

(b) However he went to state that he could not give an opinion as to whether the signatures on the fifteen cheques originated from the person who had provided eighty one sheets of specimen handwriting, namely the appellant. In short he was unable to give an opinion as to whether the appellant had signed the fifteen cheques so as to match SP1's signature.

(c) SP8 was able to conclude on the basis of a comparison of the handwriting on the particulars of the fifteen cheques with the specimen handwriting handed in by the appellant that he had filled in the particulars of the cheques.

(d) The appellant in his defence conceded that he had filled in the particulars on the subject cheques. He however denied that the signatures on those cheques were made out by him.

[33] In justifying his conclusions, SP8 explained that he had considered contemporaneous documents of specimen signatures of SP1, the appellant as well as original documents signed by SP1 compared with the signatures on those fifteen cheques. He further explained that he had made comparisons between the similar and different elements in the respective handwriting of these persons to arrive at an opinion with the assistance of forensic scientific techniques. Further details of the methodology utilized are set out in his evidence.

[34] The net result of SP8's evidence was to exclude SP1 as a signatory of the cheques. The trial judge accepted the expert's opinion in this matter and having reviewed his evidence there appears to be no reason why his opinion should not be accepted. Indeed it is telling that the appellant's defence too is aligned along the same lines outlined by the expert, in that he admits that the handwriting of the particulars on the subject cheques, is his handwriting. It may safely be concluded from the foregoing that

there was no direct evidence to prove that it was the appellant who had placed the signature purporting to be that of SP1 on those fifteen cheques.

How Is The Court To Ascertain Proof Of 'Forgery' In The Absence Of A Definitive Opinion From The Handwriting Expert And Direct Evidence On This Issue?

[35] In the absence of such direct evidence it is open to the court to rely on circumstantial evidence to aid it in arriving at a conclusion. In *Dato' Mokhtar Hashim & Anor. v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 at p. 116 it was said:

> ... It is also contended on behalf of the 1st appellant that P17A is documentary hearsay and that the handwriting and signature therein must be proved to be that of the 1st appellant. *The signature or handwriting in a document may be proved by circumstantial evidence if that irresistibly leads to the inference that the person in question must have signed or written it* (*Baru Ram v. Prasanni* AIR [1969] SC 93) and a document can also be regarded as evidenced by its contents and the internal evidence afforded by the contents can be accepted as authentication as when it states facts and circumstances which could have been known only to the person to whom the authorship is attributed. *The execution or authorship of a document is a question of fact and may be proved like any other fact by direct as well as circumstantial evidence which must be of sufficient strength to carry conviction* (*Krishnabiharilal v. State* AIR [1956] MB 86, 90- 91) ...

[36] That circumstantial evidence may indeed be relied upon in the absence of direct evidence is borne out by the case of *Chandrasekaran & Ors. v. Public Prosecutor* [1970] 1 LNS 11 where Raja Azlan Shah J (as His Highness then was) concluded:

> ... I am satisfied *that there was a chain of evidence so far complete as not to leave any reasonable doubt as to the guilt of appellant No. 2. The circumstantial evidence established that in all human probability the typing of Exch. 4C must have been done by him ...*

[37] Reliance on circumstantial evidence to prove 'forgery' is also borne out by the Indian case of *Bank of India v. Yeturi Maredi Shanker Rao* [1987] Cri LJ 722 where a similar issue arose. In that case the accused was working as an accounts clerk in a bank and assisted the complainant with her banking transactions. Obtaining possession of her account book on a false pretext, he procured a third party to complete a withdrawal form on the complainant's

account and withdrew monies which he received and utilized. It was proved that the signature on the withdrawal form was not that of the complainant. The signatures on the reverse of the form taken by the bank as acknowledgement was found to be that of the accused. It was not however proved that the signature on the withdrawal form was made by the accused. At first instance the accused was acquitted of the charges against him. However on appeal this decision was reversed and the accused convicted under, *inter alia*, s. 467 of the Indian Penal Code which is similar to s. 467 Penal Code. In so concluding the appellate court found that it had been clearly established that the accused used the forged document and on the basis of that document obtained money to which he had no claim and thereby caused wrongful gain to himself and wrongful loss to the complainant. The complainant used to take the assistance of the accused whenever she wanted to have any transaction in the bank and therefore it was concluded that he knew her signature well. It could not therefore be doubted that the accused utilized the withdrawal form knowing it to be forged or at least believed it to be forged.

[38] The appellate court in dealing with the offence under s. 467 of the Indian Penal Code and notwithstanding the lack of direct proof that the accused was the one who had forged the signature on the withdrawal form stated as follows:

> ... the learned High Court acquitted the respondent because it came to the conclusion that there is no evidence to establish as to who forged the signatures of PW1 on the withdrawal form. *It is no doubt true that so far as the evidence about the forgery of the signatures of PW1 on the withdrawal form is concerned there is no evidence except the fact that the signatures are forged and the further fact that this withdrawal form was in the possession of the respondent accused who presented it in the Bank and obtained money therefrom and pocketed the same. From these facts an inference could safely be drawn that it was the respondent-accused who got signatures of PW1 forged on this document as it was he who used it to obtain money from the Bank from the account of PW1 and pocketed the same. It is no doubt true that there is no evidence as to who forged the signatures on the withdrawal form but the circumstances indicated above will lead to the only inference that it was the accused-respondent who got the signatures of PW1 forged on the withdrawal form.* In this view of the matter therefore the acquittal of the respondent for an offence under section 467 read with section 109 also could not be justified ...

[39] In like manner in this case, it has not been proved that the signatures purporting to be that of SP1 were made by the appellant. The question that therefore arises for consideration is whether there is in the instant case a chain of evidence that is 'so far complete' that it enabled the trial judge to conclude without reasonable doubt that the appellant was guilty of forging SP1's signatures on the fifteen cheques. In other words, is there a sufficient body of circumstantial evidence which affords a chain of evidence leading to the conclusion without reasonable doubt that the appellant is guilty of forging SP1's signatures on the fifteen cheques.

[40] From the evidence adduced in the course of the trial and as summarized above, it is evident that:

(a) The appellant gave SP1 a guarantee/promise that he could procure an overdraft facility from a financial institution in her name for the purposes of affording an assurance to the customers of Hazeltron Sdn. Bhd. that it had sufficient capital to operate its business;

(b) The appellant was the one who organized and procured the facility for SP1. To this end, it was the appellant who collected the loan application form, filled it, asked SP1 to sign it with SP1's husband as the guarantor before submitting it to the financial institution;

(c) When the facility was approved, the appellant accompanied SP1 and SP2 to the bank where the relevant documentation was signed;

(d) The facility granted in the sum of RM76,000 was eventually operated through an overdraft facility. Again it was the appellant who filled in the application form, asked for a current account and placed his office address as the mailing address for the purposes of correspondence with the bank. SP1 merely signed the application and a specimen signature card.

(e) All correspondence from the bank was accordingly remitted to the appellant's office address;

(f) Cheque books in the name of SP1 were collected by the appellant by his own admission.

(g) The fact that SP1 did not take possession of the cheque books is evidenced, *inter alia*, by the fact that the first two cheques which were genuine cheques in that they were signed by her, were handed to her by the appellant for her signature in leaf form. She never had sight of the cheque books;

(h) The particulars of each of the fifteen cheques was filled in by the appellant as opined by the handwriting expert, and significantly, admitted to by the appellant;

(i) The handwriting expert also specifically excluded SP1 as the author or signatory of the subject cheques, thereby ruling out the account put forward by the appellant that SP2 had taken blank cheques to SP1 and asked her to sign them, after which SP2 forwarded the cheques to the appellant;

(j) Of the fifteen cheques, six of them were encashed by the appellant and some of them bore his signature and identification number on their reverse sides;

(k) Another five of those cheques were made out in the name of a business in his wife's name, namely Syarikat Anggi;

(l) The rest of the cheques which were made out to other entities had no connection whatsoever with Hazeltron Sdn. Bhd., which as stated earlier, was not operational at the material time;

(m) The funds *in toto* were therefore utilized by the appellant for his own or related benefit;

(n) The appellant did not deny that these monies had been so utilized save to maintain that he had shared half the cash monies with SP2 and that SP1 had authorized these payments.

[41] From the foregoing 'chain' of events it is notable that the appellant has paid a key role from the inception of the banking facility until the utilization of the funds procured by the use of the fifteen subject cheques. Can it reasonably be inferred from such a chain of events that it was the appellant who had 'forged' the subject cheques?

[42] A conclusion can only be reached by considering the appellant's version of events against the documentary and expert 'chain' of evidence shown above.

The Appellant's Defence

[43] The appellant's version of events was that it could not be concluded that the only or incontrovertible conclusion to be reached on the above facts was that he had 'forged' the subject cheques. He argued that the cheques were authorized because they had been signed by SP1. According to him, SP2 was involved in that it was he who procured SP1's signature on the cheques before handing them to the appellant and therafter received half of the proceeds of those cheques which were encashed.

[44] However this 'defence' was only brought up during the defence case. It was not raised during the course of the prosecution case, with the net result that the aforesaid facts, namely that SP2 had procured SP1's signature on the subject cheques, was never put to SP2 at any time during the course of cross-examination. In this context, the learned trial judge concluded that the failure of the defence to put to SP2 the defence contention that SP2 had procured SP1's signatures on the subject cheques and then shared half the proceeds from the encashment of those cheques, could only mean that the defence was conceived as an afterthought and had no genuine basis. The effect of failing to put the defence case to the prosecution witnesses is explained comprehensively in *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705 where Edgar Joseph Jr. FCJ explained the general principle thus:

> Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention – in other words, 'kept up its sleeve', as it were – and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence. However, failure on the part of the defence to put its case, as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.

A … it is settled law that, although a court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rests upon it.

B

[45] The trial judge in the instant case came to the conclusion that the defence was an afterthought based on a consideration, *inter alia*, of the defence put forward by the appellant and an appraisal of other relevant considerations such as the credibility of
C the appellant, the circumstantial evidence set out above as well as the expert evidence. (See also *Wong Swee Chin v. PP* [1980] 1 LNS 138 and *AEG Carapeit v. AY Derderaian* [1961] AIR Cal 359).

[46] Finally, the trial judge made a finding of fact to the effect
D that she disbelieved the appellant and found his evidence to be less than credible. She has outlined her reasons as set out above. Essentially she found the defence version of events to be contradictory and the demeanour of the witness evasive. The trial judge had the advantage, which this court did not, of seeing and
E hearing the appellant and some of the witnesses. In *Tan Chow Soo v. Ratna Ammal* [1967] 1 LNS 178 Lord Diplock said:

An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial Judge who heard the evidence
F in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment.

[47] It is evident from the evidence on record that either the
G appellant or SP1 and SP2 are speaking the truth. The trial judge, on the basis of the evidence concluded that SP1 and SP2 were telling the truth. In so concluding she took into account the documentary and expert evidence and weighed it against the oral evidence put forward by the appellant. It does not appear, that
H in so doing, the trial judge has erred or failed to take into account material considerations or ignored serious contradictions in the evidence of the witnesses. Having regard to the trial judge's finding, as well as having appraised the entire appeal record closely there appears to be no reason to fault the conclusion reached by
I the trial judge.

[48] Can it therefore be concluded from the entirety of the circumstances that the only inference to be drawn in this case is that it was the appellant who forged SP1's signature on the fifteen subject cheques? It appears that these circumstances can and do lead to the indubitable/certain inference that it was the appellant who forged the signatures on the fifteen subject cheques. In summary therefore, the circumstantial evidence, expert evidence and documentary evidence considered in totality establish that the learned trial judge did not err in arriving at her conclusion of guilt *vis a vis* the appellant in relation to the charge against him under s. 467 of the Penal Code.

Do The Fifteen Subject Cheques Comprise Valuable Security Under s. 467 Penal Code?

[49] The final element required to be proved under this section is that the document or item 'forged' must fall within the purview of s. 467 of the Penal Code. The subject matter of the charge in the instant case comprises the fifteen cheques. Section 467 of the Penal Code includes in the series of documents which are caught, "... a document which ... purports to give authority to any person to ... receive ... any money ..."

[50] Accordingly the fifteen cheques would fall within the purview of the section. The ingredients required to prove the offence under s. 467 Penal Code therefore appear to be made out. This ground of appeal fails.

Issue (ii): Were There Material Contradictions Between The Evidence Of SP1 And SP2 Which Warranted A Rejection Of Their Evidence On The Substantive Issues Before The Trial Judge?

[51] This issue has to some extent been considered above. However the appellant's specific complaints about the assessment of the evidence of SP1 and SP2 which his counsel submitted as amounting to material contradictions included the following:

(a) That SP1 was inconsistent in her testimony because she initially stated that she did not know anything about the issuance of cheque books or the fifteen subject cheques, but in cross-examination said instead that she signed two cheques which were presented to her by the appellant because she believed him.

A In point of fact, there is no real inconsistency here as it is not in issue that the two cheques were indeed signed by SP1 at the behest of the appellant to enable the payment of legal fees and insurance for the charged property. These two cheques do not comprise a part of the charge against the appellant.
B Therefore when SP1 maintained that she did not know about the fifteen 'forged' cheques or the issuance of cheque books, this is borne out by the evidence. SP1 never collected cheque books, while the appellant admitted doing so.

C (b) It was also submitted that SP1's testimony should be entirely rejected because in her first information report she had stated that she was not aware of the grant of the overdraft facilities by EON while in her testimony she says that she was aware.

D Again this is not a material contradiction because it is not in dispute that after the bank approved the facility, SP1 went to the bank with the appellant and her brother to sign the requisite documentation. While there is no evidence that she was aware of precisely when the overdraft facility was granted
E to her, she became aware that it had been approved and was operational when she signed the specimen signature card and signed the first two cheques at the appellant's behest. Therefore her statement in her first information report has to be considered in the context of the undisputed evidence
F related by all the witnesses as to events prior to and upon the opening of the account.

Additionally this evidence relates to matters prior to the issue of the 'forgery' of the cheques and does not impinge upon the evidence central to such forgery. It cannot therefore comprise
G a material 'contradiction' justifying the rejection of SP1 and SP2's evidence.

(c) Another 'contradiction' raised was that SP2 had maintained that the overdraft facility in SP1's name was for the
H withdrawal of funds in favour of Hazeltron, unlike SP1's testimony where she had maintained that the facility had been procured purely to assure Hazeltron's clients that it had capital. A reading of the evidence will show that SP2 stated that Hazeltron had no bank account and that SP1's facility
I was to be utilized for Hazeltron's business.

> While there is a difference between SP1 and SP2's evidence in so far as to whether or not the overdraft facility could actually be drawn down for use in the business, such difference is not sufficiently material in the context of the present charge to be construed as a material contradiction. In any event the difference is academic because it is not in dispute, as averred by the appellant himself, Hazeltron was not operational during the time when the subject cheques were 'forged'. Therefore there was never any question of the cheques having been utilized for the benefit of Hazeltron Sdn. Bhd. or its operations. As such this 'difference' in SP1 and SP2's evidence is immaterial.
>
> The trial judge in her consideration of the testimony of SP2 concluded that "... In spite of some minor discrepancies in his evidence when cross-examined, his testimony remained quite intact ..." She evidently considered these issues and also came to the conclusion that the differences were not so material as to warrant a rejection of their evidence as a whole.

[52] Moreover, no two witnesses can give identical evidence. If SP1 and SP2's evidence had matched identically in all aspects, this in itself would have given rise to suspicion that the witnesses had concocted their evidence.

[53] In *Pie Bin Chin v. Public Prosecutor* [1983] 1 LNS 70 Wan Yahya J (as His Lordship then was) stated:

> ... Discrepancies are no doubt present in this case, as they do ostensibly appear in most cases in evidence of witnesses for the prosecution as well as the defence. The transcripts of most evidence, when thoroughly toothcombed by any able lawyer, never failed to yield some form of inconsistencies, discrepancies or contradictions but these do not necessarily render the witness's entire evidence incredible. It is only when a witness's evidence on material and obvious matters in the case is so irreconciliable, ambivalent or negational that his whole evidence is to be disregarded.

[54] And in *PP v. Datuk Haji Harun bin Haji Idris (No. 2)* [1976] 1 LNS 97 Raja Azlan Shah FJ (as His Highness then was) expounded the position in law as follows:

A ... In my opinion, discrepancies there will always be, because in the circumstances in which the event happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened ... the question is whether the existence of certain discrepancies is sufficient to
B destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good, and cogent reasons, to accept one part of the testimony of a witness and to reject the other.

C **[55]** As such, this ground bears no merit and also fails.

Sentence

[56] Although this issue was not at the forefront of the submissions for the appellant, it is raised in the petition of appeal.
D Section 467 of the Penal Code provides on conviction for a sentence of imprisonment of up to twenty years and/or the payment of a fine. The trial judge handed down a sentence of two weeks imprisonment and the payment of a fine of RM40,000 (Ringgit Forty Thousand) failing which a term of imprisonment of
E five years is to be served by the appellant.

[57] In deciding on this sentence the trial judge states that she took into account the public interest by considering the nature and gravity of the offence, which she characterized as amounting
F to an abuse of the trust placed in the appellant by SP1. The prevalence of such offences was also considered. As against this she considered the appellant's plea in mitigation and that the appellant had had this matter hanging over his head for seven years.

G

[58] The basis for the imposition of a fine of forty thousand ringgit was that the appellant had caused grave financial loss to SP1. As such the trial judge surmised, "... it is only appropriate that the sentence passed should reflect the loss he had caused
H ..."

[59] This reasoning here is less than clear. The grave financial loss suffered by SP1 will not be compensated by the imposition of a fine for forty thousand ringgit, as SP1 is not the beneficiary of the fine. In order for SP1 to recover her loss, a civil suit would
I have to be instituted to recover the monies she has lost.

[60] The fact that the fine 'reflects' the amount of loss caused does not appear to be a sound basis for the imposition of such a sum. There also appears to be no other reason given for the imposition of such a sum by way of fine. Neither is there any reason given for the term of five years' imprisonment imposed in the event the appellant does not pay the fine of forty thousand ringgit.

[61] It is at the forefront of my mind that an appellate court should always be slow to interfere with the exercise of discretion by the sentencing judge. However in this instance, where there appears to be no tenable basis for the imposition of that part of the sentence relating to the fine and the term of imprisonment in default of the payment of such fine, this court is constrained to set aside that portion of the sentence and substitute instead, a fine of five thousand ringgit (RM5,000) and in default of payment of such fine, a term of imprisonment of three months. The rest of the sentence remains intact namely the term of imprisonment of two weeks. Accordingly the appeal is allowed in part in relation to sentence only. That part of the appeal relating to liability is dismissed. The appellant is therefore sentenced to two weeks imprisonment and a fine of five thousand ringgit in default of which a term of three months imprisonment is imposed.